No. 14188

United States
COURT OF APPEALS
for the Ninth Circuit

BART McKENNEY and MARIE McKENNEY, individually and as co-partners doing business under the name of McKenney Logging Company, *Appellants,*

vs.

BUFFELEN MANUFACTURING CO., a corporation, *Appellee.*

EINAR GLASER, DOROTHY GLASER and McKENNEY LOGGING CORPORATION, a corporation *Appellants,*

vs.

BUFFELEN MANUFACTURING CO., a corporation, *Appellee.*

REPLY BRIEF OF APPELLANTS EINAR GLASER and DOROTHY GLASER

Appeals from the United States District Court for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 9-54

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Appeals from the United States District Court for the District of Oregon.

I.

Re: Appellee's Point II Response to Appellants' Contention that the Transaction was a Mortgage.

Appellee points to an inaccuracy in Appellants' Brief in which it was stated that Appellants' own property was

transferred to Buffelen as additional security. The statement is erroneous in part insofar as it says that the land was transferred to Buffelen. But it is an accurate statement in all other respects because Appellants' timber lands were included in and made subject to the contract. The contract recites specifically (Tr. 128) that the Loggers

> "are the owners of either the fee title or the contract logging rights for the area described in Schedule 'C' attached hereto and made a part hereof, and signed for identification by the parties hereto".

The Schedule "C" (Tr. 145) lists and describes the property of Mr. and Mrs. McKenney and Mr. and Mrs. Glaser. This property, along with the property purchased with the "advances", is expressly made subject to the provisions of the contract and constituted security, the same as the Belding property described in Schedules "A" and "B" which were purchased with the advances. The use of the word "transferred" was an inadvertence.

Finding of Fact No. IV (Tr. 87), which is based on Stipulation No. IV in the Pre-trial Order (Tr. 12), reads:

> "By June of 1950 Defendants McKenney and Glaser had repaid Plaintiff all *loans and advances* made to them by it; *including Plaintiff's loans and advances for the purchase of the timber lands and cutting rights covered by the contract* which is Plaintiff's Exhibit 1, together with the interest thereon."

The finding of fact establishes that the relationship was that of debtor and creditor, and mortgagor and mortgagee with respect to the timber lands paid for in part with money advanced by Buffelen.

The Contracts, Exhibit 24 and Exhibit 1, both confirm the fact that the Loggers were in a distressed condition which resulted in the application of a loan. The Loggers had signed a contract to purchase the Belding and Scritzmeier timber prior to the contract, Exhibit 24. After they had logged part of the timber and paid part of the purchase price, it was recognized that they would be unable to pay the balance of the purchase price on or before December 31, 1946, and would forfeit that contract and their interest in the timber lands if the payment was not made at that time. It was in that situation that McKenney went to Buffelen

> "to get the money to buy this timber. Well, I considered quite a while, because I could lose my shirt. But their relations had been good, and their money was as good as anyone else's, so they advanced some money to buy this timber." (Tr. 282).

This is the money that is referred to and paid for the timber referred to in the Contract, Exhibit I.

McKenney went to Buffelen for the money because he had been borrowing money from Buffelen for some time prior thereto. The contract, Exhibit 24, was entered into for the purpose among other things, of securing the loan with which the Belding timber (the very timber involved in this case) was purchased (Contract, Exh. 24; Tr. pp. 557-8).

The contract provides that the logger

> "will secure such advance by . . . transferring title to such timber so acquired to the Lumber Company."

The arguments advanced by Appellee that the transaction did not originate in a loan and there was no

economic duress and that Buffelen paid the entire purchase price, are dissipated by this very contract under which the money was advanced and the Belding and Kritzmeier properties were acquired. It demonstrates beyond question the materiality and relevancy of the contract (Exhibit 24) upon the issue whether the transaction was a mortgage.

The contract, Exhibit 1, itself refers to and recognizes that it had its origin in an earlier contract. When the two are read together, it is readily apparent the Exhibit 1 is but a revision or modification of Exhibit 24.

It is no wonder that Appellee urges the Court to close its eyes and ignore the existence of the contract, Exhibit 24.

Exhibit 24 was not excluded for lack of proof of authenticity or any other ground except that it was "entirely immaterial". (Tr. 555). No objection to the introduction of that exhibit as evidence was made on any ground (Tr. 555) except

> "that agreement was superseded by the January 8, 1948, contract". (Tr. 555).

Appellee cannot now urge that it was inadmissible for any other reason than materiality. Appellants do not claim that the contract, Exhibit 24, is in force or that it was not superseded by the contract, Exhibit 1. It is only contended that Exhibit 24 is material and relevant as bearing upon the *interpretation of the contract and the intention of the parties*.

For that purpose, all prior negotiations, contracts, circumstances, etc. are material and relevant in a case of this kind.

Umpqua Forest Ind. v. Neenah-Oregon Land Co., 188 Or. 605; 217 Pac. 2d 219.
59 C.J.S. 77, Sec. 40.

The money with which the Belding and Kritzmeier properties were purchased and title acquired, was not advanced under the contract of January 8, 1948. The money was loaned and the title was acquired under the contract of May 22, 1946, and the title was taken in the name of Buffelen to "secure such advance". (Tr. 559).

It is not true, as argued by Appellee, that the instrument itself (Exh. 1) is controlling on the question whether the transaction was a mortgage. The ultimate question is determinable from a consideration of

> "the previous negotiations of the parties, their agreements and conversations, and the course of dealings between them prior to and leading up to the deed in question."

59 C.J.S. 77; *Umpqua Forest Ind. v. Neenah-Oregon Land Co.,* 188 Or. 605. (Appendix p. 4, former Brief.)

In cases of this character

> "we must look at the essential nature of the transaction and not play upon phrases . . . If this was their contract (loan with security) the form in which they have cast the agreements, is immaterial." (*Dollar Case,* Appendix p. 2, former Brief).

> "It is a question of the intention of the parties and not the form of the words or of the instrument". Hall Case. (Appendix p. 3, former Brief).

It is argued that there is no evidence that McKenney owed a debt on the Belding contract. The very money that Buffelen advanced was

> "to complete the payment of the balance due for such Belding timber," (Tr. 559).

and the transfer of title to Buffelen was made to "secure such advance". (Tr. 559).

It is argued that there was no debt to be secured and that without a debt, there can be no mortgage. This contention is contrary to finding of fact No. IV (Tr. 87).

Appellee would expunge from the contract, the provision that

> "the Loggers are indebted to the Lumber Company for advances made to them"

that $5.00 a thousand is to be deduced from the purchase price of logs

> "until all of the money advanced or subsequently to be advanced by the Lumber Company . . . has been paid . . . plus interest at the rate of 4%" (Tr. 130).

and it would expunge the provision (Tr. 131), that

> "In the event, however, when the timber of the Lumber Company is all logged, the Logger shall pay to the Lumber Company any additional amount required to reimburse it for the total cost of its holdings. . . ."

In the face of findings of fact No. IV and the provisions of the first and second contracts, and other circumstances developed by the evidence. the conclusion No. V (Tr. 91) that the transaction was not a loan and security transaction, is clearly erroneous.

The argument on page 27, Appellee's Brief, that the advances do not

"relate to that timber"

is clearly contrary to the finding of fact No. IV.

Appellants do not contend that the 1946 contract is still in force, but it is relevant upon the question of the intention of the parties to the transaction. For the purpose of presenting the intention of the parites, the two contracts must be read together. The second contract carries out the intention of the first contract as to the relationship which the parties bear to each other. It recognizes that Buffelen made advances (loans). As between Buffelen and the Loggers, the monies paid to the vendors constituted advances for the account of the Loggers and both contracts create an obligation to re-pay all the advances. This includes the money advanced for the purpose of lands as well as monies advanced for other purposes and all expense incurred by Buffelen.

Re: Appellee's Point III - Contention That Partners are Liable for $50,000.00 for the Removal of Logs by the Corporation.

Appellee prefaces the argument with an erroneous statement of Appellants' contention. Appellants do not contend that the "prepayment of stumpage" executed the contract. The Logging Company did not pay or prepay for any "stumpage." They did not buy any "stumpage." They merely re-paid to Buffelen the loans and advances that were made to pay the balance of the purchase price of the Belding Timber and other loans (Finding of Fact No. IV, Tr. 87).

The Partnership did not become the equitable owners of "Buffelen's timber" by reason of the payment. The partners were *at all times* the equitable owner of the timber. It never was Buffelen's timber. Appellee merely had, in equity, a lien upon the timber lands as security for the indebtedness and the lien was discharged when the debt was paid in full.

Appellee now, for the first time, asserts a liability against the partners for the $50,000.00 *on the ground of trespass*. It now asserts (Br. 31) a

> "derivative liability of the Partnership causing the Corporation's trespass."

No such cause of action was set forth in the complaint or advanced in the Pre-trial Order. There is *no finding of fact or conclusion of law to support this contention.*

Liability for trespass as against the Logging Company, Partnership, was expressly disclaimed by Appellee (Tr. 286-7),

> "Mr. Dezendorf: If the Court please, trespass is asserted only against the McKenney Logging Corporation and not against the company. There are only two respects in which a violation of the contract is charged by the partnership. One is in respect to *attempting to assign the contract* without Buffelen's consent, which is expressly prohibited, and the other is in *failing to give Buffelen* the *first option to buy logs* produced from the properties. *Performance* by the company, the partnership, *of all other conditions of the contract is admitted in the case.*"

The aforesaid statement of record clearly precludes the contention now made that the partners are subject to direct or "derivative" liability for *trespass*.

Paragraph V of the Pre-trial Order (Tr. 14) states Plaintiff's contention as to the liability of the Partnership as follows:

"(a) by reason of the *failure to tender* to plaintiff for purchase *logs* produced by them from the lands covered by the contract, and

(b) by reason of the *attempted sale* and conveyance to defendant McKenney Logging Corporation."

There is not the slightest intimation in the Pre-trial Order that the partners are being charged with liability in tort for trespass, derivative or otherwise, or for removal of timber.

The Corporation alone is charged with trespass in the contentions set forth in the Pre-trial Order (Par. VI, Tr. 14).

Finding of Fact No. X (Tr. 88) sets forth that the Corporation cut and removed timber. It does not charge the partners with cutting and removing timber, nor is there any finding of fact which would charge the partners with the so-called "derivative" liability. There is no consensual relationship between the Logging Company and the Corporation that would subject the Partnership to liability for the Corporation's acts.

The Authorities, cited by Appellee, do not support its contention that the Partnership is subject to a "derivative" liability for trespass. The cases and texts, re-

ferred to, do not involve cases in which timber is cut by the beneficial owner of the land in possession.

In 63 C.J. 934, Sec. 77, the text says:

> "One who merely sells property to which he has no title is not liable for trespass committed by his vendee."

In 52 Am. Jur. 862, Sec. 33, the text says:

> "As a general rule, one who merely sells property to which he has no title is not so liable. Hence, where land belonging to another is conveyed, the seller is not, by the mere sale, liable for trespass by the purchaser."

The reference to the Annotation in 127 A.L.R. 1016, deals with

> "sale of *timber on another's land*".

In the case at bar, there was no sale of the timber. The Partners sold to the Corporation all of the timber lands in which they had the equitable ownership. It was not a contract to cut and remove timber from lands which the Vendor did not own.

The applicable part of the *Annotation* appears at page "1019", titled "Sale or lease of *land* Belonging to Another". The text says:

> "Where *land* belonging to another is conveyed, it seems that the seller is not, by the mere sale, liable for trespass by the purchaser."

And cases are cited in support of that text.

In the case of *Greek Catholic Congregation v. Plummer,* 127 A.L.R. 1008 - 12 Atl. 2d 435 (Pa.), which precedes the Annotation, the Court held that the grantor

can only be held where the *grantor actively participates* in the commission of the trespass as, for instance, where the grantor directs the removal of the timber or supervises its removal, or receives the proceeds from the sale of the timber which is removed.

The Court, in that case, cites and quotes from the Restatement of the Law of Torts, Section 158, page 363, Comment I, as follows:

> " 'if the actor has commanded or requested a third person to enter land in the possession of another, the actor is responsible for the third person's entry if it be a trespasser.' "

The Court also quotes from the decision of the Supreme Court of Newfoundland as follows:

> " '*A mere sale of property,* to which a man has no title, *does not of itself carry with it a cause of action* against the seller, *even though the purchaser subsequently trespasses* on and converts the property to his own use. It must first be proved that the defendants actually took possession of the property in question, or exercised actual dominion over it, or delivered it to the trespassers in some other manner than by the mere delivery of a document purporting by its alleged construction to convey a title. In order to fasten a liability on defendants in this action for legal damage . . . *these defendants must have actually* by *themselves, or their agents* or *servants, wilfully trespassed upon the plaintiff's property,* and taken down the house and converted the goods to their own use, or wrongfully deprived the plaintiff of them.' "

In the case at bar, there is not a scintilla of evidence of the participation of the Partners in the cutting and removal of timber or of the commission of any of the

affirmative acts of the character referred to above and there is no finding of fact to that effect.

In the Annotation in LRA 1918 (D), 220, cited by Appellee, the text says (p. 223):

> "But where the land itself is conveyed it seems that the seller is not, by the mere sale, liable for trespass by the purchaser."

In any event, Buffelen could only recover for trespass upon the strength of its own ownership of the "logs" removed and not upon the weakness of the Defendants' title thereto. We have already demonstrated that Buffelen was not the owner of either the land, the timber thereon, or the logs cut from the timber after the indebtedness was paid. It only had a questionable subsisting option to buy logs. The logs removed were not the property of Buffelen and it cannot recover the value of the logs.

In *Fordson Coal Co. v. Kentucky River Coal Corporation,* 69 F. 2d 131 (Sixth Cir.), the Court held:

> "It is clear that under the law of Kentucky one who neither cuts nor removes timber from, nor commits any trespass upon, the land of an adjoining landowner, *but merely sells the timber thereon* to another, who alone cuts and removes it, is not liable to the adjoining landowner in an action of trespass for the value of the timber so removed, and for damages growing out of its removal. York v. Hogg, 171 Ky. 599, 603, 188 S.W. 663; Kentucky Harlan Coal Co. v. Harlan Gas Coal Co., 245 Ky. 234, 244, 53 S.W. (2d) 538. It was held in both of these cases that there is no relation of principal and agent, or privity of interest, between vendor and vendee; that the vendor's liability arises only out of his contract of sale, and the deed made pursuant

thereto, and such liability is not susceptible to the construction that the vendor authorized, advised, encouraged, incited, or procured the commission of the trespass, though a lessor who vests the right of privilege in a lessee to cut timber on land covered by his lease, reserving royalty to himself, may occupy a different position in relation to a trespass committed by the lessee."

Re: Appellee's Point IV.

Under Point III, Appellants Glaser and Glaser contend that the Court erred in awarding judgment against them in the sum of $118,000.00 for alleged failure to supply logs for the operation of the Batterson Mill.

It is not true, as Appellee asserts, that Appellants do not deny that Buffelen demanded delivery of logs and that Appellants failed to deliver them. Defendants Glaser and the Corporation have maintained throughout that there was no refusal on their part to deliver logs.

It is established beyond question by Appellee's own witness, Gansberg (Tr. 468 to 474), that the Batterson Mill had sufficient logs to operate on a one shift (contractual) basis from January to October 1952—the period in question.

It is not true that Gansberg's testimony to this effect was due to any misunderstanding. His testimony to this effect was clear and unequivocal. He testified on direct examination (Tr. 468):

> "Q. What is the fact as to whether or not you were able to get all the logs you needed to operate the Batterson Mill after *January* 16, 1952?
>
> A. Well, we were able to get enough logs to run on a one shift basis. . . ."

On cross-examination, he testified (Tr. 470):

> "Q. Did I understand your answer to be that you were able to get enough logs in this period from *January until the present time* to operate on a one shift basis?
>
> A. Yes. That was due partly to *mill breakdowns* and then also when the logging would continue, we would be able to gain on the inventory that way. . .
>
> . . . . .
>
> Q. How many months did the mill operate since *January* of this year?
>
> A. I believe the operation started in April and it was down for a time because of the *strike and* then down for a time in October because of lack of logs due to no logs being put in because *the loggers were shut down.*
>
> Q. They were shut down on account of *fire weather?*
>
> A. That is right. Yes. . . . (Tr. 474).
>
> Q. How many shifts did you operate?
>
> A. One.
>
> Q. *One shift straight through during all the time* that you were operating. Is that correct?
>
> A. No. There were shutdowns for *strike* and *fire weather.*"

This testimony from Plaintiffs' own witness, demonstrates beyond question that during all of the time from January to October 1952, the mill had enough logs to operate on a one shift basis and that the shutdowns during that period of time (from January to October) were due to fire weather, strikes, breakdowns, etc. and *not to lack of logs.* There is not a word of testimony in the record that during that period when the mill could operate, that it had to be shut down for lack of logs. The shutdown during part of January, February and March is not attributed by Gansberg to the inability to obtain logs.

The lack of evidence to establish that the Batterson Mill could be operated at a profit from January to October 1952 on a one shift basis, or any basis, is fully discussed in the Opening and Reply Briefs of Appellants McKenney and in the Opening and Reply Briefs of the Corporation. The arguments are adopted by Appellants Glaser and will not, therefore, be discussed further at this point.

Buol's and Carr's testimony that they offered to sell logs to Buffelen is confirmed by the testimony of Buffelen's Vice President Pohlman, its Division Manager of raw materials, Holm, and by Gould who operated the mill part of the time.

Pohlman testified (Tr. 373) that when Buol and Carr came up to Tacoma on September 27th, that Carr told him that "the purpose of their visit was to sell us logs," and at the same meeting, they discussed at length, details of submission of scale sheets and invoices for logs (Tr. 375 to 377).

Gould testified (Tr. 229) that

> . . . Everything was very harmonious, he (Buol), agreed that he would promptly start supplying the mill with logs. . . ."
>
> "Q. You testified that they had agreed to deliver logs?
>
> A. That is right."

Holm testified (Tr. 258), that at the conversation on September 27, 1951, when Buol and Carr came up to Tacoma, that

> "they said they came to Tacoma, wanting Buffelen as a customer, or something in those words."

This testimony confirms Buol and Carr's testimony that they wanted and offered to sell their logs to Buffelen and contradicts the assertion that the offer to sell logs to Buffelen rests on

> "discredited testimony of Defendants Buol and Carr".

It is asserted in a rather apologetic way that

> "Moreover, they were strangers to Buffelen and no reason is suggested why Buffelen should deal with them rather than the Partners with whom it had an existing contract for the same logs." (Br. p. 53).

For the purpose of determining whether Appellee is entitled to recover for loss of profits allegedly due to inability to obtain logs for the operation of the Batterson Mill, it is immaterial whether the logs were offered by the Logging Company or the Corporation. It presented an opportunity to obtain logs for the operation of the mill and any loss sustained would be due to Buffelen's refusal to purchase the logs from the Corporation and not from refusal to sell logs.

There is conclusive evidence in the record supplied by Appellee itself, that logs were, in fact, tendered by the Corporation and accepted by Appellee. But the transactions were not consummated because in the one instance (raft 46) Appellee sent the check in payment to the Logging Company instead of the Corporation and it was returned for that reason. Appellee did not thereafter tender the check to the Corporation (Exh. 4, Tr. 154 to 156). In the other instance, Appellee sent checks totaling approximately $70,000.00 in payment of logs,

but attached a condition to the acceptance of the checks, that the acceptance be without prejudice

> "to Buffelen's right to declare a forfeiture of the contract involved in the above action." (Tr. 242).

It is apparent that the controversy does not stem from the refusal to sell logs to Appellee, but from the controversy that arose by reason of the injection of Gould as a purchaser of the logs. It was only a few days after the conversation regarding Gould as a purchaser of logs that this law suit was commenced on October 15, 1951 (Tr. 6).

Consequently, there is no basis for the contention that loss was sustained from failure to supply logs for the operation of the Batterson Mill.

Re: Appellee's Point V.

Under Point IV, Defendants Glaser contend that the failure to obtain the written consent of Buffelen to the transfer of their interest in the timber lands to the Corporation, did not constitute a breach of the contract and does not warrant the setting aside of the transfers, on the ground

(a) that the provision prohibiting a transfer of the properties without the written consent of Buffelen, became inoperative after the indebtedness had been paid and Buffelen became merely the holder of the naked legal title IN TRUST for the Logging Company; and

(b) that in any event, Buffelen acquiesced in the transfer and did not at any time prior to the commencement of this action object to the transfer of title to the Corporation.

The latter contention has been discussed at length in Point IV of the prior Brief of Appellants Glaser and Glaser and will not be pursued further except to say that the assertion made by Appellee (p. 38) that

> "the *decision* to reject the Corporation and enforce the contract was made only *after* the Corporation's Attorney informed Mr. Neal that the Corporation had taken the timber free of Buffelen's rights under the contract",

is without supporting evidence. There is no evidence in the record of any communication, oral or written, subsequent to the communication between Mr. Neal and Mr. Griffin constituting a rejection of the Corporation as transferee of the properties and it is conceded in that statement that there was no rejection before.

Of course, the Corporation acquired the property freed of the lien created by the contract because Buffelen no longer had any mortgagee interest in the property. The only surviving right under the contract, if any, was the option to purchase logs. This option, if surviving, would not preclude a sale of the partners' interest in the lands.

There was no rejection of the Corporation by Buffelen at any time. On the contrary, the whole course of procedure from September 27th, 1951, the moment that Buffelen became aware that the Corporation had acquired the property to the time that the action was commenced, October 15, 1951, is consistent only with its willingness to do business with the Corporation; that the transfer without the written consent, was not even men-

tioned or put forward as an objection to the transaction of business.

It is argued that no forfeiture is asserted because the partners have no interest in Buffelen's land, and that none was necessary (Br. 39). This argument is, of course, predicated on the erroneous premises that Buffelen was the beneficial owner of the land which we have demonstrated is not true.

We are concerned at this point with the effect of the provision against transfer of the property without written consent in *the absence of specific provision creating a forfeiture for violation of that provision*. We have heretofore demonstrated that in the absence of such a provision the Logging Company's interest in the lands as beneficial owner thereof, could not be forfeited for the transfer of the properties without written consent even if there had been no acquiescence.

The case of *Coquille M. & T. Co. v. Dollar Co.*, 132 Or. 453, is not at all in point. The essential facts are the converse of those in the case at bar. In that case plaintiff was at all times the owner, legal and equitable, of timber lands. It entered into a contract with Defendant's Assignor which the Court held constituted merely

> "a permit or license which authorized the Randolph Company or its Assignee to enter upon the premises and cut the timber",

at a given price per thousand. The Court held that this did not create in the Defendant's Assignor or the Assignee, any interest in the land. They were merely to pay for "logs" as and when they were cut.

> "It was not required to pay for the logs until after the trees were felled."

The Court held that the license to cut logs terminated, according to its terms, at a given date and that thereafter the Defendant had no further right. It was under these circumstances that the Court held that

> "his right terminates at the conclusion of the term even though timber remains upon the land and the contract contains no provisions for a forfeiture:"

In the case at bar, the Logging Company, and later the Corporation, was the beneficial owner of the lands and timber thereon and it is the Buffelen Company that is seeking a forfeiture of their beneficial ownership of these timber lands in the absence of a provision for forfeiture in the contract as a penalty for transferring Defendants' own lands without its written consent.

Re: Appellee's Point VI.

There is no inconsistency between the contention of Appellants that the option to purchase logs had been abandoned, and any other contention advanced by Appellants. The contention on page 72 of Appellants' Brief was based upon the hypothetical existence of the option. It was qualified by the statement in parenthesis,

> "assuming that it had not been terminated".

Appellee's assertion that it was not obliged to take "all" of the logs—the "entire output" of logs, is contradicted by the contract. It recites the option was

> "to purchase all of the *entire output* of the Logger". (Tr. 126).

Appellee agrees to

> "purchase *all* merchantable fir logs", (Tr. 131)

and to purchase

> "*all* merchantable fir logs . . . which are dumped in the Company's pond . . . (Tr. 132).

The Loggers agreed

> "to give to the Lumber Company at all times first right and option to purchase the *entire output* of the Loggers at market price . . ." (Tr. 134).

It has already been demonstrated that Appellee did not at any time exercise the option to take the "entire output" so as to convert the option into a binding contract enforceable by the Appellants. The option could only be exercised by an unequivocal election to take the "entire output" of logs as and when produced until the timber was exhausted. This was never done and the whole course of procedure of Appellee demonstrates that it had no intention of doing so.

If it be true, as asserted, that the timber was purchased to guaranty a log supply for the Tacoma and Batterson plants, Appellee could have accomplished that purpose by exercising the option to take the "entire output" and not leave the Logging Company at Appellee's mercy in conducting the logging operations and marketing their logs. Since the contract did not specify the time within which the option to take the "entire output" was to be exercised, the law implies that the option would have to be exercised within a reasonable time. The length of time between the making of the contract, January 8, 1948, and the transfer of the prop-

erties, September 1951, a period of over three years, is, under the circumstances, more than a reasonable period of time. The failure to purchase peeler logs at all, the failure to take all of the saw logs and the closing of the Batterson Mill for a period of three months, without taking any logs, warranted the belief that the option to take the entire output had been abandoned.

Re: Appellee's Point VII.

Contrary to Appellee's assertion, Appellants contention that the Court below erred in granting equitable relief, is not based on the proposition that the relief was "inappropriate". Appellants' contention is that there was no jurisdiction to grant any equitable relief upon the record in this case. This is based upon the ground that

(a) the record establishes that Appellee had no subsisting lien or other interest in the timber lands in question after the loan was paid, and hence, there was no equitable right to be protected or enforced by equitable relief; and

(b) the option to purchase logs (personal property) (if it survived) is not enforceable in equity. A breach of an option contract would only give rise to an action at law for the recovery of damages.

We are not concerned here with the procedural question whether Appellants waived the right to trial by jury. The question at issue at this point, is whether the Court below committed error in granting the specific equitable relief contained in the decree.

It is argued that this is a new contention and that it was waived by failure to raise it in the lower court.

The question was, in fact, raised in the Court below:

(a) The answers specifically allege:
"The complaint fails to state a claim against these Defendants upon which relief can be granted." (Tr. 6 and 8);

(b) at the close of the Plaintiff's case, Defendants moved the Court for an order of dismissal on the ground
"that upon the facts and the law, the Plaintiff has shown no right to the relief sought in the complaint." (Tr. 279);

(c) The appeal from the decree clearly presents the question whether the decree is supported by the record, both as to the equitable relief and the money judgment contained in the decree and judgment.

The question whether the Court had jurisdiction to grant any equitable relief upon the record, is never waived and was not waived in this case.

The action was brought in the Federal Court by reason of diversity of citizenship and the question of jurisdiction to grant equitable relief must be determined in accordance with the laws of the State of Oregon governing equitable jurisdiction.

In the State of Oregon, the distinction between law and equity is rigidly maintained.

> "Equitable rights must be both averred *and proved* before purely legal rights will be determined by a Court of Equity." (*Powell v. Sheets*, 196 Or. 682-697 (1952).)

The Court in that case went on to say:

> "The rules of law thus firmly established in this State preclude an examination of the questions of damages alleged in the cross bill when the proof shows there was no equity therein."

In *Glaser v. Slate Construction Co.,* 196 Or. 625-631, the Oregon Supreme Court quotes from one of its earlier decisions as follows:

> "This Court has held . . . that where there is an entire lack of matter of equitable cognizance, the objection is not waived by failure to interpose it at the proper time but it is *available at any stage* of the proceeding, a distinction being made between that kind of a case and a case which falls within the field of equitable jurisdiction but in which an element essential to complete jurisdiction is lacking."

The distinction between law and equity jurisdiction, is so well rooted in the State of Oregon, that when the Court finds that there is no basis for equitable relief,

> "no basis remained for the Equity Court to enter a money judgment." (*Barber v. Henry,* 197 Or. 172-183.)

In *Maxwell v. Frazier,* 52 Or. 183, the Oregon Supreme Court said:

> "Where there is a total absence of matter of equitable cognizance, the objection of want of jurisdiction is not waived by answering to the merits."

In *Gelinas v. Buffum,* 52 F. 2d 598 (Ninth Cir.), this Court held:

> "It may be contended that because the defendant acquiesced in the equity proceeding, she cannot now complain. But, as we have seen, such acquiescence cannot confer equity jurisdiction where, on the face of the pleadings, averments establishing equity jurisdiction are lacking."
>
> . . . . .
>
> "In the instant case, the remedy at law is not only adequate, but it is the only remedy, if any, to which the plaintiff is entitled under the pleadings."

In *Love v. Morrill,* 19 Or. 545, the Court held:

> " . . . if it appears from the evidence that the real dispute between the parties is not recognizable by a court of equity, the complaint should be dismissed. The want of jurisdiction did not and could not have appeared until the evidence was taken, and therefore we fail to see how defendant is precluded from urging this question on the hearing in this court. When the facts necessary to give the court jurisdiction are stated in the complaint and are denied by the answer, the question of jurisdiction becomes one of fact, to be determined on the hearing, and is not waived; and where during the progress of the trial want of jurisdiction appears, it is the duty of the court to dismiss the bill."

In 30 C.J.S. 451, Sec. 88, the text says:

> "In considering the question of waiver of an objection to equity jurisdiction, a distinction must be made between an entire lack of matter of equitable cognizance, and cases within the field of equitable jurisdiction but in which an element essential to plaintiff's right to call upon the court for relief is lacking. Where the cause or subject matter is regarded as being entirely outside the field of equitable cognizance, *the objection cannot be waived,* and is not waived by failure to interpose it at any particular time, but is available at any stage of the proceeding. This rule has been applied also to failure to comply with statutory requirements concerning a preliminary showing of equity jurisdiction. In statement the rule has been restricted to lack of equity apparent on the face of the bill; *but it applies also when on final hearing plaintiff wholly fails to make out any case of equitable cognizance."*

This text is supported by a great many decisions, including decisions of the Supreme Court of the United States; decisions of this Court, and Oregon decisions.

In the case at bar, at the conclusion of the entire case, the record established that Appellee had no right, title or interest in and to the timber lands involved; that the equitable lien which it had as security for the indebtedness, has been extinguished and that it held the naked legal title as Trustee for the Appellees. Consequently, there was no subsisting equitable right to be protected or enforced by a court of equity. Insofar as the decree grants equitable relief, is clearly erroneous.

The cases cited by Appellee in support of its contention of waiver, do not involve the question of whether the jurisdiction of the Court to grant equitable relief is warranted by the record. In citing the cases, Appellee omitted to call attention to the limitation which the Courts place upon the rule of waiver, pointed out in a number of the cases cited.

For example, *Cobban v. Conklin,* 208 Fed. 231 (Ninth Cir.), cited by Appellee, the Court took the precaution to quote from the decision of the Supreme Court of the United States in the case of *Reynes v. Dumont,* 130 U.S. 354, that

> "the above rule (regarding waiver) must be taken with the qualifications that it is competent for the Court to grant the relief sought and that it has jurisdicion of the subject matter."

The rule of waiver is not applicable in his case.

Appellee now attempts to bolster its claim to equitable relief by asserting that it did exercise the option and that mutuality required by Oregon law is present. Appellee's references to the testimony at this point, merely establishes that Appellee did from time to time, pur-

chase some logs. But there is not a scintilla of evidence that it at any time before or after the commencement of this action, made an unequivocal election to convert the option into a binding bilateral contract to purchase the "entire output" of logs. This matter is discussed fully in the Reply Brief of the Corporation, pages 25 to 27 and the argument there presented is hereby adopted.

Appellee's contention that equity has jurisdiction to cancel the transfers from the Logging Company to the Corporation because they are a cloud on its title, is untenable because as against Appellants, it is not the beneficial owner of the property. It holds naked title in trust for the Corporation or the Logging Company.

Neither does a Court of Equity have jurisdiction to enjoin trespass as against the beneficial owner of the property who is in possession at the suit of one who merely holds the naked legal title in trust for the beneficial owner in possession.

CONCLUSION

For the reasons set forth in the Opening Brief and in this Reply Brief, the decree and judgment entered against these Appellants should be reversed and the complaint dismissed.

Respectfully submitted,

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